

**First Nation Consultation:  
a  
Practical Guide**

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CAID

# First Nation Consultation a Practical Guide

## Preamble:

*First Nation Consultation: a Practical Guide* was written to provide brief practical bullets on what a conscientious resource corporation should do to meet a First Nation's expectation for consultation. The background and general model for the Meaningful Consultation process can be found in *Meaningful Consultation in Canada: The Alternative to Forced Aboriginal Assimilation* (2009)<sup>1</sup>. Other papers written in this series include *Working Papers on Meaningful Aboriginal Consultation: Overview* (2009)<sup>2</sup>, *Working Papers on Meaningful Aboriginal Consultation in Canada: Step 1 - Nation Consultation* (2010)<sup>3</sup> and *Practical Meaningful Consultation in Canada* (2011)<sup>4</sup>.

This brief was not prepared through legal counsel. Should you use this brief, or any part of it, in support of consultation with a First Nation, seek legal advice. We do not accept civil or criminal responsibility for individual, group, or corporate use of information contained within this document. For more detail, do not hesitate to inquire of the author.

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*First Nation Consultation: a Practical Guide*

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<sup>1</sup> (2009) Herbert, R. G., *Meaningful Consultation in Canada: The Alternative to Forced Aboriginal Assimilation*. <http://caid.ca/MeaCon092409.pdf>.

<sup>2</sup> (2009) Herbert, R. G., *Working Papers on Meaningful Aboriginal Consultation: Overview*. <http://caid.ca/MeaConOve101609.pdf>

<sup>3</sup> (2010) Herbert, R. G., *Working Papers on Meaningful Consultation in Canada Step One - Nation Consultation*. <http://caid.ca/MeaConOne102309.pdf>

<sup>4</sup> (2011) Herbert, R. G., *Practical Meaningful Consultation in Canada*. <http://caid.ca/PracMeaCon022511.pdf>

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## Goal:

For practical purposes:

- The Crown discharges its consultation duty as “due process.”
- Common law defines consultation as the reconciling of pre-existing Aboriginal rights with the sovereignty of the Crown and breaks consultation into consultation and accommodation components; together referred to as, “meaningful consultation.”
- The United Nations (UN) sees consultation as pre- and prior informed consent regarding international rights outlined in the UN Declaration on the Rights of Indigenous People.
- First Nations understand consultation as the process by which:
  - A project will acquire community consent; and,
  - The wrongs of colonization and cultural genocide will be corrected.
- Community consent engenders immemorial rights in the traditional territory to:
  - Live on the land and restrict access to the land;
  - Hunt, fish and gather for their families;
  - Manage resources (minerals, water, oil and gas, wildlife, air);
  - Protect the land and its resources; and,
  - Have their children benefit from their territory and its resources.
- Immemorial rights apply to past, present and future generations equally.
- First Nations see that the consultation process must consult two levels of rights generally referred to as “Our Rights” and “The Land:”
  - Immemorial Aboriginal rights to the traditional territory (Our Rights); and
  - Rights of the land, water, air and life at the specific site of the project (The Land).
- Consultation of these two levels of rights must be done for past, present and future generations.
- In a general sense: Community consent is given if the end result of the consultation process accommodates both Our Rights and The Land by:
  - Respecting the past: - Sacred places and teachings
  - Respecting the future: - The project site and region must be able to sustain traditional pursuits for 8 generations after the project ends.
  - Respecting the present: - The project must not overly hinder traditional pursuits or the land while directly benefiting the people.
- Residential school fallout has scrambled, to varying degrees, culture and authority lines within First Nation communities resulting in shifting authority chains and seemingly de novo issues that abruptly surface during consultation processes. However, the authority of a First Nation generally rests in its citizens as guided by their elders. The Chief and Council have signing authority.

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## Seeking Consultation:

- First Nations have a right to be consulted at the earliest point possible in a project.
- This point will be at the initial drafting stage if there is a Crown duty to provide meaningful consultation on Aboriginal rights.
- The Crown has a duty to consult if:
  - The planned project includes activities that were not foreseen during the land claim/treaty process;
  - The project site is located in the traditional territory of a First Nation without a land claim/treaty; or,
  - The planned project, or project site, interferes with Aboriginal rights protected under Section 35 of the Constitution Act (1982).
- First Nation governance is contacted in person on a number of occasions with increasing dialogue until a request to consult the First Nation is submitted.
- It would be prudent to negotiate an Intent MOU (Memorandum of Understanding) which outlines intent, expectations, funding and capacity. This Intent MOU enables the corporation to ask the community what it would like included in the consultation process.

## Information:

- In general, communities only take in small bits of information at a time but yet draw conclusions on the entire project based on personal priorities and concerns. The order issues are introduced in the consultation process is key in preventing entrenchments from derailing projects.
- Early access to information is key in preventing disinformation from gaining control.
- A minimum of five information delivery systems should be maintained:
  1. For community citizens;
  2. For community groups;
  3. For governance;
  4. For regional interests; and
  5. For outside interests.
- Early project information should be prioritized by community concerns and made available as soon as a Consultation MOU for the consultation process details is in place.
- Information should evolve and not exceed the status of the consultation process loop. This is key in preventing the perception of a hollow “due process.”
- Each information delivery system, and the complexity of information shared within each system, must be specifically tailored to the group receiving the information.

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## Social Capital Investment:

- There should be social capital investment in the community as a sign of good faith that is independent of the provision for capacity.
- Preferred investments include:
  - Children;
  - Artisans; and,
  - Social gatherings.
- If monies are made available to the community in place of direct corporate control, a reasonable accountability reporting structure should be put in place.
- Key to the success of social capital investment is both the choice of programs to fund and the absence of a fiduciary-like perception to the funding.
- Serious consideration should also be given to funding the community in support of the assertion of Aboriginal rights, including donating to a legal fund.

## Providing Capacity:

- There are four aspects to the provision of capacity:
  1. Administrative capacity;
  2. Funding capacity;
  3. Staffing capacity; and,
  4. External Capacity.
    - a. Consultation capacity; and,
    - b. Environmental Review.
- The dedicated consultation capacity (third party) is to ensure the consultation process is documented and reasonably adheres to a time table.
- The independent environmental review of corporate practices or protocols is to counter the environmental lobby and establish visible best practice protocols for the project.

## Defining the Cultural Component:

- Different First Nation communities can have similar roots and cultural practices but it is a fatal error to assume they are the same and not consult at an early stage to define cultural components that must be included in the consultation process.
- Cultural components may include, but are not restricted to:
  - Elder consultation;
  - Community consultation;
  - Unique local councils (youth, women, hunters, trappers, etc.);

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- Governance councils (land management, economic development, etc.);
  - Regional councils (shared resources, land management, governance, overlapping land claims, intercommunity agreements, etc.);
  - Other affected First Nations; and,
  - Traditional knowledge.
- Every group within the cultural component will have to have their information needs met.

## Consultation Loop:

- The average First Nation citizen does not have a clear understanding of their right to consultation, the accommodation of their section 35 rights, their land claim rights or the nature of an Impact and Benefit Agreement. So, their perception of the consultation process is as important as meeting the requirements of a consultation process. Even when an appropriate consultation process is delivered, the vast majority of the community may not perceive they have been consulted; Perception is key.
- The consultation process must be flexible and adapt to a changing understanding of the project within the community. However, there are core pieces of information that must be obtained to complete a predetermined algorithm, or the results of the consultation process will not accomplish its goals.
- First Nations cannot be expected to digest the whole project in one viewing or voice adequately their concerns under conditions that overwhelm.
- The consultation process needs to focus on bite sized pieces that are introduced in a manner that reflect the level of concern (i.e. start with reclamation to address future generations before working with the present and past generations).
- By compartmentalizing issues under consultation into digestible units, the consultation process becomes a repeating loop until all issues have been consulted.
- Some consultation loops can be done concurrently while others must be done consecutively.
- The Crown may need to be included in the consultation process as a last step if a duty for the Crown to consult exists.
- Issues that must be consulted include, but are not limited to:
  - Impact
    - Reclamation;
    - Site location – traditional knowledge;
    - Cumulative impact;
    - Land;
    - Water;
    - Wildlife;

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- Plant life;
    - Air; and,
    - Access.
  - Safety:
    - Environmental;
    - Community; and,
    - Accountability.
  - Compensation:
    - Regional (ie. other affected First Nations);
    - Local (community, councils, *etc.*); and,
    - Individual (ie. harvest interruption).
  - Benefits and Roles:
    - Regional;
    - Community; and,
    - Individual,
  - Project Specifics:
- Each issue must be consulted in the context of:
    - Each phase of the project;
    - Our Rights
    - The Land at the project site; and,
    - Each cultural component;
  - So, one consultation loop may look like:
    - Elder consultation;
    - Community consultation;
    - Consultation of other cultural components;
    - Presentation to Chief and Council;
    - Ratification by First Nation;
    - [Discussion with Crown]; and.
    - Repeat with next issue to consult.
  - The number of consultations loops, the depth of each consultation loop and the number of cultural components that need to be consulted will all depend on:
    - The pre-existing relationship of the corporation with the First Nation;
    - Relationships between the First Nation and other resource corporations;
    - The existence of land claims or treaties, and their contents;



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- The extent of consultation required by the Crown;
- Relationships between the First Nation and other regional communities;
- The nature of the resource project under consultation; and,
- The strength of the environmental lobby against the project.

## **Agreement in Principle:**

- The first goal of the consultation process is to acquire an appropriate level of understanding for the First Nation's concerns (and potential solutions) on issues relating to the proposed project. This understanding is then used to identify and accommodate the First Nation's immemorial rights (Our Rights and The Land's rights) within an Agreement in Principle.
- In the Agreement in Principle, details are left out to allow the document to be used by both sides in future negotiations and as a starting point for arbitration in the event of disagreements.

## **Impact and Benefit Agreement:**

- The second goal of the consultation process is to acquire an appropriate understanding of rights for land, water, air, life (The Land's rights) and the First Nation (Our Rights) at the specific site of the project for the Impact and Benefit Agreement (IBA).
- The IBA is a detailed negotiated agreement between the First Nation and the corporation that is built from the Agreement in Principle.
- The IBA is both:
  - Site-specific; and,
  - Project-specific.
- The focal point of the IBA is to ensure the accommodation of Our Rights and The Land's rights is done for past, present and future generations.
- For reasons not of their own making, many First Nation communities have little to no infrastructure in an environment deplete of social healing. The sudden infusion of a large revenue stream into a community or a family can be detrimental. A coordinated plan to prepare the community and its infrastructure to minimize deleterious effects of the project's benefits is key to the long term health of the community and the project. The IBA must not result in a community that appears the same or worse off.

## **Project expansion or a New Project with the Same First Nation:**

- In the event the corporation wishes to expand the project or its presence in the First Nation's traditional territory, The Agreement in Principle with a new site location consultation loop would be used to negotiate a second, or modify the original, IBA.

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## **Environmental Assessment:**

- The submissions for the federal, provincial or territorial environmental assessment process must not be done until the results of the consultation process can be included to accommodate Aboriginal rights.
- The corporation should work with the First Nation, where possible, to prepare documents for the assessment.
- The corporation should initiate the environmental assessment process after the First Nation is fully informed of the contents and timing of the application's submission.
- The corporation's interest would be best served if information contained within the application for environmental assessment was presented to the community in a manner that would validate the consultation process.
- Funds and capacity should be provided for the First Nation to participate in the environmental assessment process as needed.

## **Licensing:**

- Submissions for additional project licensing should be managed in the same manner as the submission into the environmental assessment process.

## **On-going Consultation:**

- The community must be provided with information and project updates in a continuous manner to ensure clarity and community support.